IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. .....

WILLIAM ELBERT LAWRENCE,
Petitioner.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The Opinion Below.

The opinion of the Supreme Court of the State of Illinois is printed in the record. (Rec. 40-49) and officially reported in Advance Sheet dated ..... No. ..... Vol. 390, Illinois Official Reporter, p. .....

Statement of Jurisdiction, Questions Presented and Facts.

The statement under which the jurisdiction of this court is invoked, of the questions presented and the factual matter so far as relevant appear in the petition to which this Brief is annexed.

BRIEF.

I.

Summary.

Two recent decisions by the United States Supreme Court are deemed by Petitioner to be conclusive to the proposition that the act known as the Illinois Habitual Criminal Act is void.

In the case of *Tot* v. *United States*, 319 U. S. 463 63 S. Ct. 1241 the Federal Firearm's Act was held to be void because, as the court there said: "The defendant is under the handicap, if he takes the witness stand, of admitting prior convictions of violent crimes. His evidence • • • is thus discredited in the eyes of the jury before it is given." That case was decided June 7, 1943. The case at bar presents exactly the same situation. (See Count 2 Indictment. Rec. 2-5 and Judgment Order Rec. 14.)

In the case of *Skinner* v. *State of Oklahoma*, 316 U. S. 535; 62 S. Ct. 1110, 1113 the court held the Habitual Criminal Act of the State of Oklahoma to be void and Justice Stone said: (page 1115) "A law which condemns all individuals of a class to harsh measures without hearing because some or even many may merit condemnation lacks the first principle of due process of law." (See Habitual Act—Appendix B.)

That is the situation in the case at Bar.

Also the act is like the Oklahoma statute in that the Act here in question "lays an unequal hand on those who have committed intrinsically the same quality of offense and" (imprisons for life and full term) "sterilizes one and not

the other." The court there said that is an "invidious discrimination"—as if the legislature had selected "a particular race or nationality for oppressive treatment." The court pointed to "Embezzlement" in Oklahoma as an offense that is "forever free" under the Habitual Act there in question. The situation in Illinois under the Act now before the court is exactly the same. Like Oklahoma "Embezzlement" is "Forever free." The same is true of those other serious offenses, "Assaults with intent to commit felonies," of all "Attempts" and of many other similar situations. The same "invidious discrimination" that existed in the Oklahoma statute that was held to be void also exists under the statute now at Bar and the holding of the Court in the *Skinner case* is conclusive to the proposition that the Illinois Habitual Act is void. This case was cited in the Brief filed in the Illinois Supreme Court—but was wholly disregarded in the opinion filed by that Court. (Rec. 40-49.)

The opinion by the state court does not even mention the decisive case of *Skinner* v. *State of Oklahoma* and, while the opinion does mention *Tot* v. *United States*, it does so only to avoid its operation by the suggestion that instructions to the jury would cure all objection to the allegations *"in apt words,"* reciting previous convictions as set forth in the Indictment under the terms of the Act now in question. That such Instructions cannot and do not cure such objections is clearly shown by the decision of the same court, rendered March 21, 1945 in the case *People* v. *Livermore*, 390 Ill. 85 wherein, at page 96 that court quotes from *People* v. *Novotny* 305 Ill. 549 as follows:

> "Such an instruction would not erase from the minds of the jury the fact, which was fixed by the testimony, of the supposed character of the man whom they were trying. It cannot be regarded as a fair

> trial where the prosecution has been permitted to blacken the character of the defendant before starting on an investigation of the crime with which he is charged, merely because afterwards the jury were instructed that they should not pay any attention to that testimony."

The *Livermore case* was reversed and remanded, whereas, the case at bar was affirmed by the same court a few days thereafter. In the *Livermore case* the court said (Page 102):

> "The answer * * * was highly prejudicial in that it informed the jury that a grand jury had returned other indictments against plaintiff in error—ten of them. Indeed it is doubtful whether the prejudice could have been removed by * * * admonishing the jury that it was not to be considered by them. * * * Proof of other indictments against the accused tends to build in the minds of the jurors the belief that he has engaged in other acts of misconduct." (Citing cases.)

It is submitted here that this decision of the Illinois Supreme Court demonstrates that the *prejudice could not be* removed by admonishing the jury. The prejudice incident to the recital of the prior "Conviction or convictions, judgment or judgments" *"in apt words"* as required under the statute at Bar is certainly quite as obvious as the prejudice that arises upon the trial of any other case. Yet, in the case at Bar, the court avoided the effect of *Tot* v. *United States* by suggesting "proper instructions." The prejudice is much too clear to be avoided by any instructions and the state court itself has made the demonstration.

This is a remarkable situation in that the *Livermore case* decision was delivered two days after the case at Bar was argued before that Court. Can Instructions do in the *Lawrence case* at Bar what they cannot do in the

Livermore case? Obviously the Illinois Court has contradicted itself.

Moreover, the opinion relies entirely on *obiter dictum* found in *Graham* v. *West Virginia.* (Rec. 46; 40-49.)

The Illinois Habitual Act is a Bill of Attainder. Petitioner shows that he was convicted and sentenced under a Bill of Attainder, the said Act being repugnant to the United States Constitution and a void act. That he was denied immunity and the protection of the constitution of the United States, particularly under the Fourteenth amendment thereof. The claim was fully set forth in the state courts, i.e., that the Illinois Habitual Act was and is a Bill of Attainder and repugnant to the Constitution of the United States which provides Section 10, Article I that "no state shall pass any Bill of Attainder law," etc. (See Claim of Immunity. Rec. 7-13; 22-28.)

Immunities within the protection of the constitution of the United States include "Bills of Attainder" inhibitions. (Fourteenth Amendment—Appendix C; Slaughter House cases, 16 Wall. 36, 77-78; 21 L. Ed. 394, 409; *Malinski* v. *New York*, 65 S. Ct. 781, 787.)

"Whether Wisconsin has denied any rights under the Federal Constitution is our ultimate responsibility." (*Hotel, etc.* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 440; 62 S. Ct. 706.) The Federal immunity was claimed specially in the Criminal Court of Cook County and on Writ of Error in the Supreme Court of Illinois. (*Norris* v. *State of Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074.) Immunities arising out of the nature and essential character of the national government and granted and secured by the constitution of the United States are protected against invasion. (*Madden* v. *Kentucky*, 309 U. S. 83, 90; 84 L. Ed. 590, and cases cited; *Hague* v. *Committee for Industrial Organizations*, 307 U. S. 496, 59 S. Ct. 954; 83 L. Ed. 1423; *Snowden* v. *Hughes*, 321 U. S. 1.)

This court has said that where a federal right or immunity is claimed in the state court the court will inquire whether the right was denied not merely in express terms but also in substance and effect. (*Norris* v. *Alabama*, *supra*.)

The Act of 1883 and as amended in 1941 is commonly known as the Habitual Criminal Act (although that phrase does not appear in the act anywhere). Its text in the original form is set forth in Appendix A. As amended it is set forth as Appendix B. Under it "The new crime alone" is punished by harsh "full term" penalty. (*People* v. *Hanke*, 389 Ill. 602, 604.

Petitioner points to the seeming conflict existing in the decisions of this court, *i. e.*: *Cummings* v. *Missouri* and *McDonald* v. *Massachusetts*.

In the *Cummings case* the Missouri constitution provided for a "Test Oath" and that provision and penalties thereunder were held to be void, the same being a Bill of Attainder law. The Missouri Supreme Court sustained the Missouri constitution by holding that "He (Cummings)

> "is not liable for any acts supposed to have been done or committed *antecedently* but for violating an actual subsisting law after its enactment."

Nevertheless, the United States Supreme Court held the Test Oath provisions to be void as a Bill of Attainder. (*Cummings* v. *Missouri*, 71 U. S. 277; 4 Wall. 277; 18 L. Ed. 356.)

In the *McDonald case* (180 U. S. 311; 45 L. Ed. 542; 21 S. Ct. 389) the Habitual Act of Massachusetts was held to be valid (without any reference made to the prior case of *Cummings* v. *Missouri*) and in the *McDonald case* it was held that the more severe punishment of the Habitual Act was for "The new crime alone." We urge that the

constitution is still in full force and effect and that it was disregarded in the *McDonald case* and in like cases. The Question of Attainder was not raised in the *McDonald case*. The Illinois Act and the Massachusetts Act are Bills of Attainder.

The test oath provisions of the Missouri Constitution were considered to be valid by the Missouri Supreme Court because, as that court said: "He is not held liable for any acts supposed to have been done or committed *antecedently*, but for violating an actual subsisting law after its enactment," and this is parallel to the very recent decision of the Illinois Supreme Court under the Act at bar. In *People* v. *Hanke*, 389 Ill. 602 (604) decided March 21, 1945, the Illinois Court said, speaking of the Habitual Act at bar:

> "The punishment is for the new crime only. The penalty is made heavier because the defendant is a habitual criminal. The prior conviction is not an ingredient of the subsequent offense. It is merely a matter of aggravation which affects only the punishment to be imposed for that offense." Citing *People* v. *Atkinson*, 376 Ill. 623.

The statement by the Illinois Supreme Court in its opinion in this case makes the parallel with the Missouri situation complete. The United States Supreme Court held that Cummings was unlawfully convicted under a Bill of Attainder. That is the exact situation under the statute at bar.

Further, the Illinois Habitual Act requires that a previous conviction and judgment be set forth in the Indictment "*in apt words*" and this violates the standard of fair play required by due process clause of the fourteenth amendment to the constitution of the United States. (*People* v. *Smith*, 296 Mich. 176; 295 N. W. 605, 607; *Tot* v. *United States*, 319 U. S. 463, 466, 470; *State* v. *Smith*,

128 Oregon 515; *State* v. *Lawson*, 22 S. E. 2nd 643-646; Remarks of Judge Fox.) State action must conform to fundamental principles of liberty and justice. (*Buchalter* v. *People*, 319 U. S. 427, 429; 63 S. Ct. 1129, 1130; 87 L. Ed. 1492; *Lisenba* v. *California*, 314 U. S. 219, 236; *Hebert* v. *Louisiana*, 272 U. S. 312-316; 47 S. Ct. 103-104.)

Further, the Act lays an unequal hand upon those who have committed intrinsically the same quality of crime. (*Skinner* v. *State of Oklahoma*, 316 U. S. 535, 541; 62 S. Ct. 1110, 1113.) Larceny is within the Habitual Act. Embezzlers are "Forever Free." The situation as to embezzlement is the same in Illinois and Oklahoma. Further, all attempts, all assaults to commit felonies and many other like crimes are excluded from the operation of the act.

The legislative classification of objects in the Act is purely arbitrary. The Act provides "oppressive treatment" for crimes that are *not* infamous crimes and does not so provide for crimes that are infamous crimes. There is no real distinction in any of the offenses that were selected for "oppressive treatment" with reference to any basic purpose of the Act. (Appendix B and H.)

Further, the Act introduces into Illinois procedure a "Trial by the Record", a separate method of trial. The Constitution of Illinois provides that "Trial by jury as heretofore enjoyed shall remain inviolate" but the Act of 1883 destroyed Trial by jury and denies due process of law.

The Act makes the courts of Illinois into mere automatic adjuncts to foreign courts wherefore the act is void. (*In re Opinion of Justices*, 251 Mass. 569.)

Further, the Act lacks the first principle of due process of law. The Act is in operation and effect the wholesale condemnation of an entire class to serious invasion of

personal liberty without any opportunity to any individual and without opportunity to petitioner to show that his case is not the type of case which justifies the resort to harsh measures. (*Skinner* v. *State of Oklahoma*, 316 U. S. 535, 62 S. Ct. 1110, 1115; *Morrison* v. *California*, 291 U. S. 82, 90; *Boettcher* v. *Howard Engraving Co.*, 389 Ill. 75-79. Decided January 17, 1945.)

> "A Law which condemns all the individuals of a class to harsh measures without hearing lacks the first principle of due process of law." (Justice Stone in *Skinner* v. *State of Oklahoma*.)

Petitioner shows that convicted persons form a class, a state or a status—a tained class and the attaint may attach anywhere and once acquired there is no statute of limitations that runs against the attaint. The repeal of the statute upon which the attaint is based does not relieve against the attaint. A conviction in Canada was used in Louisiana as a basis for greater punishment. That the states go outside their own jurisdiction and act upon a conviction anywhere. A full and complete pardon does not relieve against the attaint nor does acquittal by a jury. All this is fully shown by the cited authorities.

It is believed that this case calls upon the court to reconsider a precedent decision (McDonald's case), as the court has often been required to do. (*West Virginia* v. *Barnette*, 319 U. S. 624; 63 S. Ct. 1178, 1181, 1198.) The *McDonald case* did not pass upon the Question of Attainder. The Bill of Rights is operative. (*Feldman* v. *United States*, 64 S. Ct. 1082, 1089.)

The Supreme Court has said: "It is intended that the rights of citizens should be secure against deprivation for past conduct." (*Cummings* v. *Missouri, supra; citing Ogden* v. *Saunders*, 12 Wheat. 266; 6 L. Ed. 606.) The Supreme Court is not at liberty to grant or withhold

the enforcement of Constitutional commands. (*Skinner* v. *Oklahoma*, 316 U. S. 535; 62 S. Ct., 110.)

We are at the point now where convictions may be had upon alleged violation of "directives" and "regulations" and it would seem to be vital to future liberty that this question of the power to increase punishment upon only record proof of previous conviction as provided by Bill of Attainder Laws should now be re-examined in the light of the more recent decisions by this court (*Skinner* v. *Oklahoma* and *Tot* v. *United States*) and especially in view of the obvious conflict between the cases mentioned, *i. e.: Cummings* v. *Missouri* and *McDonald* v. *Massachusetts*. In each of these last two cases the punishment was for *"The new crime alone"* but while both are Bills of Attainder the results are contradictory. The present question goes to the present day value of the provision that "No state shall pass any Bill of Attainder law." An increased penalty *"for the new crime alone,"* based upon a status, *i. e.:* because one is a colored man, or, because one is of any particular race or nationality, or had at some time lived somewhere else, would promptly be held void. The increased penalty in the case at bar is upon the prior status of "Convict"—hence void.

The Illinois Supreme Court (Rec. 49) in this case said:

> "True, he has been subjected to increased punishment because of the fact that he has been previously convicted."

Such a finding by the highest court of Illinois would seem to be conclusive to the proposition that the Habitual Act at bar is a Bill of Attainder and void. He is being punished more severely because of the previous conviction and that is said in the teeth of the Constitution that provides that "no state shall pass any bill of attainder law"

and recalls that this court said in *Cummings* v. *Missouri*, 71 U. S. 277:

> "It is intended that the rights of the citizens should be secure against deprivation for PAST CONDUCT by legislative enactment, under any form, however disguised. If the inhibitions can be evaded by the form of the enactments its insertion in the fundamental law was a vain and futile proceeding." (Justice Field.)

II.

Points and Authorities.

POINT I.

The Act of 1883 as amended in 1941 is a BILL OF ATTAINDER law repugnant to Section 10, Article I of the Constitution of the United States which provides: "No state shall pass any Bill of Attainder law," etc.

Section 10, Article I, U. S. Constitution, Appendix D.

Cummings v. *Missouri*, 71 U. S. 277, 4 Wall. 277, 18 L. Ed. 356.

Ex parte Garland, 71 U. S. 333-377, 18 L. Ed. 366, 4 Wall. 333-377.

Pierce v. *Carskadon*, 16 Wall. 234, 21 L. Ed. 276.

Gaines v. *Buford*, 1 Dana (Ky.) 510.

Fletcher v. *Peck*, 6 Cranch. 138.

South Carolina v. *United States*, 199 U. S. 448.

4 Chitty Criminal Law, 353 and 538.

House Document 398, 69th Congress, 1st Session, pp. 596-597.

Act of 1883 as Amended in 1941, Appendix B.

Act of 1883 in Original Form, Appendix A.

Moore v. *Missouri*, 159 U. S. 57.

Drehman v. *Stifle*, 8 Wall. 601; 19 L. Ed. 508.

The Missouri Constitution punished for "the new crime alone" and was held void as a Bill of Attainder law.

Cummings v. *Missouri*, *supra*.

The Massachusetts statute punished for "the new crime alone" and was held to be valid.

McDonald v. *Massachusetts*, 180 U. S. 311; 21 S. Ct. 389.

The Illinois Habitual Act punishes for "the new crime only" and it is like the Missouri provisions, *i.e.*, a Bill of Attainder, and void.

People v. *Hanke*, 389 Ill. 602, 604. See Opinion (Rec. 40-49).

The *McDonald* case holds the Massachusetts statute not to be an *ex post facto* Act but it does not say whether it is or is not a Bill of Attainder. That question was not raised.

Convicted persons form a state, a status and a class—a tainted class.

Kutwitzky v. *O'Grady*, 135 Nebraska 466, 282 N. W. 396, 399.

State v. *Lawson*, (W. Va.) 144 A. L. R. 235, 22 N. E. 2nd 643.

Rand v. *Com.* (Va.), 9 Gratt 738.

Blackburn v. *State*, (Ohio) 50 Ohio St. 428.

Goodman v. *Kunkle*, C.C.A. Ind., 72 F. 2nd 334.

Cross v. *State*, 96 Fla. 768, 119 So. 380.

Kelly v. *People*, 115 Ill. 583.

People v. *Atkinson*, 376 Ill. 623, 35 N. E. 2nd 58.

People v. *Lund*, 382 Ill. 213, 46 N. E. 2nd 929.

People v. *Carlesi*, 154 App. Div. 481, 487; 139 N. Y. S. 309, 313; 233 U. S. 51, 34 S. Ct. 576, 58 L. Ed. 843.

In re Yung Sing Hee, 36 Fed. 437.

The Attaint attaches anywhere and once acquired there is NO STATUTE OF LIMITATIONS that relieves against the attaint.

State v. *Humphries*, 350 Mo. 938, 169 S. W. 2nd 350.

Murphy v. *State*, 50 Ariz. 481, 73 P. 2nd 110.

People v. *Williams*, 125 Cal. App. 387, 13 P. 82nd 841-842.

State v. *Girod,* 106 W. Va. 194, 145 S. E. 269.
State v. *Holder,* 49 Idaho 514, 290 Pac. 387.
Burt v. *United States,* 139 F. 2d 73-75.

The Repeal of the Statute upon which a Conviction is based does not relieve against the attaint.

In re Jerry, 294 Mich. 689, 293 N. W. 909.

An Attaint attached in CANADA, a foreign country, and was put into effect in Louisiana.

State v. *O'Day,* 191 La. 380, 185 So. 290.

An Attaint may attach anywhere, within or without the jurisdiction.

People v. *Dacey,* 166 Misc. 827, 3 N. Y. So. 2nd 156.

PARDON, Full and Complete does not remove the attaint. Nor does acquittal by a jury.

People ex rel. Prisament v. *Brophy,* 287 N. Y. 132, 32 N. E. 2nd 468.
State v. *Edelstein,* 146 Wash. 245, 262 Pac. 622, 631.
Groseclose v. *Plummer,* C.C.A. 9th, 116 F. 2nd 311.
Square v. *People,* Tex. Cr. App., 167 S. W. 2nd 192.
State v. *Cassady,* 121 Kan. 331, 246 P. 508.

This case calls upon the Court to reconsider a precedent decision as the Court has often been required to do.

West Virginia v. *Barnette,* 319 U. S. 624, Note 10; 63 S. Ct. 1178, 1181, 1198.

The case of

McDonald v. *Massachusetts,* 180 U. S. 311, 45 L. Ed. 542, 21 S. Ct. 389,

reversed *Cummings* v. *Missouri, supra,* without any discussion of the issues here involved and reached an errone-

ous conclusion. The Massachusetts Act, like the Illinois Act, was a Bill of Attainder. The Act punished more severely for "the new crime alone" but that was held to be "Attainder" in *Cummings* v. *Missouri, supra.*

The Bill of Rights is operative.

Feldman v. *United States,* 64 S. Ct. 1082, 1089.

"It is intended that the rights of the citizens should be secure against deprivation for past conduct."

Cummings v. *Missouri,* 71 U. S. 277.

But prior conduct is the basis for "full term" sentence in the case at bar. See Indictment and Judgment Order.

The Supreme Court is not at liberty to grant or withhold the enforcement of Constitutional commands.

Skinner v. *State of Oklahoma,* 316 U. S. 535, 62 S. Ct. 1110.

POINT 2.

The Act requires that a previous conviction be set up "in apt words" in the Indictment laid on the Act. This violates the standard of fair play required by Due Process clause of the 14th Amendment.

Tot v. *United States,* 319 U. S. 463, 466, 470; 63 S. Ct. 1241, 1244, 1246.

People v. *Smith,* 296 Mich. 176, 295 N. W. 605-607.

Malinski v. *New York,* 65 S. Ct. 781, 789, 790.

Act of 1883 as amended 1941—Sec. 602, Chapter 38, Illinois Revised Statutes—Habitual Act, Appendices A and B.

Section 2, Article II, Illinois Const., Appendix G.

Johnson v. *United States,* 318 U. S. 189, 63 S. Ct. 549.

State v. *Lawson* (W. Va.), 144 A. L. R. 235, 22 S. E. 2nd 643-646.

State v. *Smith,* 128 Oregon 515, 273 P. 323; Remarks of Judge Fox, 22 S. E. 2nd 646.
Howard v. *State,* 139 Wis. 529, 121 N. W. 133-135.
Myers v. *State,* 193 Wis. 126, 213 N. W. 645.
People v. *Atkinson,* 376 Ill. 623, 35 N. E. 2nd 58.
People v. *Hanke,* 389 Ill. 602.

State action must conform to fundamental principles of liberty and justice.

Lisenba v. *California,* 314 U. S. 219, 236; 62 S. Ct. 280, 290; 86 L. Ed. 166.
Buchalter v. *People,* 319 U. S. 427, 429; 63 S. Ct. 1129, 1130; 87 L. Ed. 1492.
Hebert v. *Louisiana,* 272 U. S. 312, 47 S. Ct. 103, 104; 71 L. Ed. 270, 48 A. L. R. 1102.
Mooney v. *Holohan,* 294 U. S. 103, 112; 55 S. Ct. 340, 341; 79 L. Ed. 791, 98 A. L. R. 406.
People v. *Lund,* 382 Ill. 213.
People v. *Hoffman,* 379 Ill. 318-323.
Malinski v. *New York,* 65 S. Ct. 781-788.
Lansetta v. *New Jersey,* 306 U. S. 451.

POINT 3.

The Act lays an unequal hand upon those who have committed intrinsically the same quality of crime.

Skinner v. *State of Oklahoma,* 316 U. S. 535, 541; 62 S. Ct. 1110, 1113.
People v. *Lund,* 382 Ill. 213, 46 N. E. 2nd 929.

The situation as to "embezzlement" is the same in Illinois and Oklahoma.

People v. *Henderson,* 378 Ill. 436.
People v. *Streich,* 361 Ill. 490, 198 N. E. 350.
People v. *Strong,* 363 Ill. 602, 2 N. E. 2nd 942.
"The protection of equal laws."

Yick Wo v. *Hopkins*, 118 U. S. 356, 369; 6 S. Ct. 1064, 1070; 30 L. Ed. 220.

Criminal Code—Attempts, Chapter 38, Sec. 581, Appendix F.

Criminal Code; Assaults to commit felony, Chapter 38, Sec. 58, Appendix E.

Fourteenth Amendment, U. S. Const., Appendix C.

POINT 4.

The legislative classification of objects of legislation is purely arbitrary. The Act provides "oppressive treatment" for crimes that are *not* infamous crimes and does not provide "oppressive treatment" for crimes that are infamous crimes.

Fourteenth Amendment of U. S. Const., Appendix C.

Stewart v. *Brady*, 300 Ill. 425, 133 N. E. 310.

Sec. 2, Article II, Illinois Constitution 1870, Appendix G.

Michigan Millers v. *McDonough*, 358 Ill. 575, 193 N. E. 662.

Chap. 38, Sec. 587 *Re* "Infamous Crimes." Appendix H.

Act of 1883 and as amended Appendix A and B.

1 Wharton Criminal Law (7th Edition), Sec. 639.

Gifford v. *People*, 87 Ill. 211.

Hayward v. *People*, 96 Ill. 492.

"Proof of misconduct not connected with the charge being tried should not be admitted.

"Such evidence is likely to prejudice a jury against the defendant and cause them to lose sight of the issues which they have been sworn to try."

People v. *Livermore*, 390 Ill. 85-102.

Addison v. *People*, 193 Ill. 405.

People v. *Hughey*, 382 Ill. 136-144.

People v. *King*, 276 Ill. 138.

Conviction of infamous crime may be only proved by the record. Crimes not infamous cannot be shown at all.

Matzenbough v. *People*, 194 Ill. 108, 112, 113.

People v. *Lehner*, 326 Ill. 216, 157 N. E. 211.

McKevitt v. *People*, 208 Ill. 467.

Chapter 38, Sec. 587 (Sec. 7, Div. II, Criminal Code) re: Infamous Crimes, Appendix H.

"There is no real distinction with reference to the purpose of the Act."

People v. *Schomig*, 74 Cal. App. 109, 239 P. 413, 414.

Carson v. *Baldwin*, 346 Mo. 984; 144 S. W. 2nd 134.

State v. *Gregori*, 2 S. W. 2nd 747, 748.

Gulf, Colorado & Santa Fe v. *Ellis*, 165 U. S. 150, 165.

International Harvester Co. v. *Missouri*, 234 U. S. 199.

Statutes of West Virginia, Missouri, Texas, Idaho, Nebraska, Montana, Arizona, New York, Kentucky, Kansas, Indiana, etc., as to general form of Second Offense Acts.

Point 5.

Trial by the Record is a separate method of trial. The Act provides for trial by the Record and denies to defendant "Trial by jury as heretofore enjoyed". "Trial by jury as heretofore", *i. e.*, at common law, did not permit any allegations in the Indictment with reference to prior convictions. The Act destroyed trial by jury as known at common law. Fourteenth Amendment to U. S. Const. (Appendix C).

State v. *Jacques*, 171 La. 994, 132 So. 657.

Sections 5 and 9, Article II Illinois Constitution of 1870. Appendices I and N.

"The right of trial by jury as heretofore enjoyed shall remain inviolate."

People v. *Wolf*, 358 Ill. 334, 193 N. E. 211.

Section 1 Chapter 28, Revised Stat. of Illinois—Re Common Law. Appendix J.

Sec. 726 Chapter 38, Criminal Code re: Trials for criminal offenses shall be conducted as at common law." Appendix K.

Allegations as to prior indictment should be stricken on motion.

State v. *Parris*, 89 S. C. 140, 71 S. E. 808. 42 S. C. Law 460. Citing *Smith's case*, 8 Richardson 460 (S. C.) and *State* v. *Allen*, 8 Richardson 448.

"Constitutional provisions may not be abrogated by the legislature nor in any other way than by changing the Constitution."

Ptacek v. *Coleman*, 364 Ill. 618, 5 N. E. 2nd 467.

"The state constitution is a limitation upon the powers of the legislature."

Fenske Bros. v. *Upholsters Local*, 358 Ill. 239, 193 N. E. 112.

Rains v. *Board of Trustees*, 365 Ill. 610, 7 N. E. 2nd 489.

The words "as heretofore enjoyed" did not appear in the constitutions of 1818 and 1848. Each of them read:

"That the right of the trial by jury shall remain inviolate."

The Constitution of 1870 added the words "*As heretofore enjoyed*" and they have a definite meaning. Appendix I.

The Act of 1883 and as amended makes impossible a trial by jury as that was known at common law—*i. e.*, "as heretofore enjoyed" and the Act is void.

"The power to conduct criminal trial in any other

mode than that which prevailed at common law is necessarily excluded."

Harris v. *People*, 128 Ill. 585.

Coke Inst. Book III, Ch. VIII (p. 485):

"There are seven species of trial at common law; By the Record; by Inspection or examination, by certificate, by witnesses, By Wager of Battle, By Wager of Law and *By Jury.*"

Trial by Battle was repealed by Act of Parliament in 1819 but has never been repealed in Illinois.

At Common Law a defendant had a free choice as to how he would be tried.

Andrew Stephens Pleading, Sec. 86, p. 171.
3 Cooley's Blackstone, 3rd Edition 331.
2 Chitty 602.
Coke on Littleton, 117b.
Glanvil Lib. 9 cap. 8.
Bracton Lib. 3 Fo. 156.
R. v. *Carlile*, 2 Bradwell & Adolphus 362, 366, 9 L. J. K. B. 250.

The usual form of plea as to the existence of a Record was "*Nul Tiel Record.*"

Willison—Stephen on Pleading 1895, Volume, Star pages 112-113.

At Common Law the clerk always demanded of defendant how he would be tried.

Hales Pleas of the Crown, Ch. 33, Vol. 2, p. 258.
Blackstone Comm. Ch. 22, Book 3 (Gavit p. 665-899-913).
Blickensderfer's Blackstone Elements, p. 199.

We still do call upon the defendant to say how he will acquit himself. (Rec. 6.)

There must be a plea.

People v. *Bain*, 358 Ill. 177-197.

The Common Law is the law of Illinois.

Heineman v. *Hermann*, 385 Ill. 191, 52 N. E. 263.

Hallam—The Middle Ages—Notes on Chapter VIII, p. 1032-1044.

Reprint in "Landmarks of Civilization" (D. Appleton Co.).

Patten v. *United States*, 281 U. S. 276.

The prior conviction cannot be set forth in the Indictment at Common Law.

State v. *Smith*, 8 Richardson 460-461, 42 S. Ct. Law 460.

State v. *Cyrus Hudson*, 32 La. 1880, p. 1052.

Brady v. *Commonwealth*, 4 Ky. 517, 1 Bibb. (Ky.) 517.

Coke Inst. Book III, Ch. VI 478, Star Page 441.

Blackstone Ch. 27, Book 4 (Gavit, p. 905).

31 Harvard Law Review 669-671.

People v. *Kelly*, 347 Ill. 237-249.

POINT 6.

The Act is uncertain, inoperative and void. It is not complete in all its terms and provisions. Read literally it is meaningless and the court must interpolate phrases into this criminal act to make it operative. This the Court may not do.

The first conviction mentioned in the Act means a conviction anywhere and at any time in the past.

State v. *O'Day*, 191 La. 380, 185 So. 290.

People v. *Dacey*, 166 Misc. 827, 3 N. Y. S. 2nd 156.

The second and third "conviction" must take the same meaning. The Act is highly penal.

People v. *Lund*, 382 Ill. 213, 46 N. E. 2nd 929.

In re Estate of Gilbert, 311 Ill. App. 28-36.

Moweaqua Coal Corp. v. *Industrial Com.*, 360 Ill. 194-200.

Lawton v. *Sweitzer*, 354 Ill. 620-625.

Sutherland, Stat. Const., 3rd Ed., p. 336 (Sec. 4703).

The Court cannot alter the words used by the legislature.

State v. *Burns*, 53 Idaho 418, 23 P. 2nd 731.

Lansetta v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888.

POINT 7.

The Act of 1883 and as amended requires the Courts upon second and third conviction to register a mechanical approval of the doings of foreign and domestic courts without examination as to the legal merits of such doings. The Courts simply set in motion machinery perfunctorily and inevitably leading to a specified judgment and that is not judicial work. The Courts cannot be made the automatic adjuncts of foreign courts—wherefore the Act is void.

In re opinion of the Justices. 251 Mass. 569, 147 N. E. 681, 701, 702.

POINT 8.

The Act lacks the first principle of Due Process of Law. The Act is in operation and effect the wholesale condemnation of an entire class to serious invasion of personal liberty without any opportunity to any individual to show that his is not the type of case which justifies the resort to harsh measures.

Skinner v. *State of Oklahoma,* 316 U. S. 535, 62 S. Ct. 1110-1115 and cases cited.

Morrison v. *California,* 291 U. S. 82, 90, 54 S. Ct. 281, 284, 74 L. Ed. 664.

Taylor v. *Georgia,* 315 U. S. 25, 62 S. Ct. 415.

Boettcher v. *Howard Engraving Co.,* 389 Ill. 75-79.

State v. *Humphries,* 350 Mo. 938, 169 S. W. 2d 350.

Fourteenth Amendment to U. S. Consti. (Appendix C).

Conclusion.

E. H. Sutherland, in "Principles of Criminology" (3rd Ed. 1939), p. 531 says:

> "These habitual criminal laws of the mandatory type developed * * * as a result of various crime commissions. They had the purpose of depriving courts and Parole Boards of the authority to fix penalties in these cases."

We urge that Judgment upon a Record without a hearing is a condemnation that lacks the first principle of due process of law and any statute that condemns without a hearing is void.

In his dissent in *People* v. *Kelly,* 347 Ill. 237 (p. 249), Justice De Young said:

> (P. 249.) "It is said that the statutes in question have been construed and applied during a considerable period. This fact does not necessarily render them

immune from constitutional attack. Where the language of the constitution is not ambiguous it is not permissible to interpret it differently from its plain meaning and a construction contrary to its terms for any period of time will be disregarded." (Citing *People* v. *Bruner*, 343 Ill. 146; *Smith* v. *Withrow*, 133 Mo. 500.)

The Illinois Supreme Court said, (Jan. 17, 1945):

> "The constitutional guaranty of due process of law without which no person may be deprived of his property, requires inquiry before judgment, hearing before condemnation. * * * The judgment here, though purporting to be a judicial determination of the rights of the parties, is, in fact, only an arbitrary declaration of the judge having no reference to such rights."
>
> *Boettcher* v. *Howard Engraving Co.*, 389 Ill. 75, 79.

This is precisely the situation in the case at bar. Liberty has the same protection afforded to property. The Illinois Habitual Act directs only one punishment, *i.e.*, the extreme penalty under the several statutes defining offenses, and under the Act the court performs no judicial function.

There is no inquiry to discover supposed criminal tendencies of the person on trial that in any wise merit a life term of imprisonment. There is no inquiry before judgment and no hearing before condemnation. All persons are alike and subjected to one punishment, *i.e.*, the maximum without regard to the supposed criminal tendencies of anyone. Those who have such tendencies and those who do not have such tendencies all alike receive the maximum sentence without hearing and without inquiry. And this sentence removes from all of them the provisions of parole laws and "good time allowance" and means exactly what the "*full term*" means, *i.e.*, life in a prison without any hope for relief under any law of any kind. All this is done on a "record" without regard to whether deserved or not.

The various points made indicate that the Act is void. Its objectives are likewise futile. A recent survey made by A. A. Hartman, 31 Journal of Criminal Law—417 "Recidivism and Intelligence" (p. 425) reads, in part:

> "Continued anti-social behavior appears to be more characteristic of brighter individuals who are personally, presumably, better endowed biologically. * * * The fact may be that it is the more intelligent individual who reacts to inequalities or injustices in our present social order and who protests more persistently. This would support the theory that crime is a cultural product, a symptom of social rather than individual disorganization."

80 University of Pennsylvania Law Review—p. 565 (p. 567) reads:

> "It is well known that the extreme severity of the English criminal law before 1827 not only did not deter crime, but increased acquittals. Something of the same re-action has met the Baume's laws. When first put into effect in New York there was considerable opposition to the law on the part of the lower courts. In Pennsylvania where the fourth offender statute is not mandatory on the Judge the statute has never been applied. * * * Apparently the solution of the present problem does not lie in this sort of legislation."

The new work entitled "New Horizons in Criminology" by Barnes & Teeters speaking of such acts (p. 100) says:

> "Such short sighted legislation has been equally potent in undermining our criminal jurisprudence and court practice through promoting bargaining between district attorneys and accused criminals and encouraging the juggling of indictments. Such criticisms as have been frequently hurled at fourth offender laws cannot be laughed off lightly by the exuberant exponents of drastic legislation to curb crime, which, in fact, tends to compromise with the real criminal element."

Such legislation has failed from every standpoint. The constitutional views that permitted it to become a menace to the entire legal system should be taken apart and re-examined.

We respectfully pray that the Petition for Certiorari be granted.

Respectfully submitted,

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